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80-691

NO. ———

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

STATE OF ARKANSAS,

Petitioner,

VS.

WILLIAM THOMAS HAYNES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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REQ. NO. 79-23859 50 COPIES

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Arkansas Supreme Court erroneously interpreted and applied *Payton v. New York*, —— U.S. ——, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), in reversing this conviction because of the introduction of evidence seized pursuant to a valid search warrant but after officers made a warrantless arrest of defendant in his motel room.

II. Whether the Arkansas Supreme Court erred in reversing this conviction in light of *Rawlings v. Kentucky*, 48 U.S.L.W. 4885 (U.S. June 25, 1980) (No. 79-5146), which the Arkansas Court apparently did not consider.

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The opinion of the Supreme Court of Arkansas is reported at 269 Ark. Adv. Sh. 506 (1980) and is printed herein as Appendix "A". The record of the hearing on respondent's motion to suppress and of his trial, together with other parts of the record before the Supreme Court of Arkansas are filed herewith and designated as Appendix "B". Petitioner's petition for rehearing was denied on August 25, 1980, without opinion. The only reported reference to that per curiam order is found at 270 Ark. Adv. Sh. No. 1 (unnumbered page).

JURISDICTION

The opinion of the Arkansas Supreme Court was filed July 7, 1980, and is reported at 269 Ark. Adv. Sh. 506 (1980). Petitioner's petition for rehearing was denied without opinion in a per curiam order entered on August 25, 1980. The only reported reference to that order is found in 270 Ark. Adv. Sh. No. 1 (unnumbered page). This petition for a Writ of Certiorari is filed within ninety days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, United States Constitution:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

The Harrison, Arkansas, Police Department began an investigation of respondent's illegal trafficking in illicit drugs about 8 p.m. on April 22, 1978, when a confidential informant reported that respondent had 55 "blotter hits" of lysergic acid diethylamide (LSD) in the refrigerator of his motel room at the Apple Valley Inn. The police conducted an intermittent surveillance of Room 114 of the inn on the night of April 22.

On April 23, 1978, at approximately 8:30 p.m., the same informant was searched, given a $5 bill with recorded serial numbers and sent to make a controlled buy from respondent. The informant was unsuccessful, and the police increased their surveillance to include Room 116 of the inn, as respondent had also been seen entering and leaving that room on the evening in question. The same informant was again sent by the police to make a controlled buy and was apparently again unsuccessful.

Police then saw one Kenneth Drewry leave Room 116 and stopped him when he pulled into a driveway in a residential area known not to be his residence. Drewry had made controlled buys for the police before, and he volunteered to make one from respondent. He was taken to the police station, where he was searched and given a $5 bill with recorded serial numbers. Drewry was followed by one police officer from the police station until his movements could be seen by the police officers who were watching the motel rooms.

Police officers at the motel observed Drewry meet respondent, who left Room 114. Drewry and respondent then entered Room 116, where Drewry had earlier seen

respondent selling blotter tabs of LSD to other persons. Drewery gave the respondent the $5 bill previously given to him by the police, and the respondent sold him two "hits" of LSD. A policeman followed Drewry back to the police station, where a detective conducted a standard field test for hallucinogens on one of the blotter tabs Drewry bought from respondent. The results of the test revealed that the blotter tab contained an hallucinogen, which the detective had reason to believe was LSD.

At that time, officers at the police station determined that there was probable cause to search the rooms involved in the transaction, and instituted proceedings to secure a search warrant for both Rooms 114 and 116. They also advised the officers watching the motel that they were in the process of procuring a search warrant.

In the meanwhile, Officer Galen Hutchinson of the Criminal Investigation Division, Narcotics Enforcement Section of the Arkansas State Police, and other officers continued to watch the motel. Hutchinson had been asked by the Harrison police to assist in the investigation. Prior to Drewry's return to the motel, Hutchinson observed about half a dozen people enter and leave Room 116. There were also several vehicles parked nearby. Hutchinson was notified that Drewry was supposed to make a controlled buy from respondent, and the surveillants observed Drewry enter and leave Room 116. After Drewry left, Hutchinson was advised that the controlled buy had taken place, that the field test had revealed the presence of an hallucinogen and that a search warrant was being sought.

At about the same time, the officers at the motel observed several people leaving the vicinity of Rooms 114 and 116, and they feared that illicit drugs were being

further distributed. Other officers stopped various persons observed leaving Room 116 as they left the vicinity of the motel.

Hutchinson determined after receiving the information about the controlled buy that he had probable cause to arrest respondent and that officers should secure the premises in order to prevent further distribution or destruction of the drugs.

Hutchinson first approached Room 116, in which he found two persons, one of whom had arrest warrants outstanding. When a second officer arrived, Hutchinson proceeded to Room 114, where he found the door standing slightly ajar. Hutchinson identified himself as a police officer and announced that he was conducting a drug investigation and was looking for respondent. When the respondent verbally identified himself, Hutchinson entered the room without drawing his gun. After respondent produced his driver's license identification, Hutchinson placed him under arrest and remained in Room 114 with the intention of securing the premises until the search warrant arrived.

At about the same time, a second officer at the scene apparently kicked in the door of Room 115, which was unoccupied and in which no guests were apparently registered. That officer then watched the occupants of Room 116 while Hutchinson secured respondent's room.

Three officers remained in and around Room 114 until the search warrant was served about three and a half hours later. Although one of the officers and the respondent told conflicting stories about the discovery of a small quantity of marijuana found in a film canister before the search warrant was served, no actual search was made of the premises prior to the arrival of the warrant.

The affidavit for the search warrant was signed by Detective Donald J. Hamilton of the Harrison Police Department. Hamilton had personally received information about respondent's possession and/or sale of illicit drugs from both confidential informants who assisted the police. The affidavit (T. 17-19) stated the grounds on which Hamilton based his belief that there were illicit drugs in both Rooms 114 and 116 and in three vehicles parked outside the rooms. Hamilton also executed an affidavit regarding the reliability of the informants, stating specifically in what prior cases they had assisted the police in making arrests in cases involving illicit drugs and stolen property. (T. 20) Drewry also signed a written statement regarding his involvement in the controlled buy. (T. 26-27)

A hearing was held on the issuance of the warrant, and a transcript of that hearing is found at T. 23-25. Following that hearing, Municipal Judge Buford Gardner issued the search warrant, finding probable cause to search Rooms 114 and 116 of the Apple Valley Inn and a 1974 Ford Courier. He refused to include in the warrant authorization to search two other vehicles parked outside the rooms. (T. 21-22)

When the warrant was executed, officers seized 21 blotter type "hits" of LSD from respondent's checkbook, a film canister containing marijuana, a marijuana cigarette, the $5 bill with which Drewry paid for the two "hits" of LSD and two "bongs" or pipes used to smoke marijuana.

Respondent filed a motion to suppress the seized evidence on August 10, 1978. (T. 12-13) The motion challenged the validity of the search warrant only to the extent that it was connected with a warrantless arrest and detention of the respondent.

A pretrial hearing was held on respondent's motion on September 15, 1978, at which time respondent, his father (who was also his roommate in Room 114 at the time of the search), and three police officers, including Hutchison, testified.

Although the trial court did not file an order ruling on the motion, it ruled at the conclusion of the hearing that it found probable cause for the search warrant and for the arrest and held that the officers "had not only the right but the duty to secure the premises and to prevent any disposition of the drugs or further circulation of same and the Court denies the Motion to Suppress." (T. 131)

The seized evidence, which included approximately six ounces of marijuana and 609 micrograms of LSD, were introduced at trial over respondent's continuing objection. The jury found appellant guilty as charged. He was sentenced to one year's imprisonment and a fine of $1,000.00 for possession of marijuana, to 20 years' imprisonment and a fine of $15,000.00 for delivery of LSD, and to 20 years' imprisonment and a fine of $15,000.00 for possession of LSD with intent to deliver. The trial court ordered the two 20-year terms to be served consecutively.

The warrantless arrest and the introduction of evidence seized pursuant to the search warrant were both raised on appeal to the Arkansas Supreme Court. In a 4-3 opinion, that Court apparently found the intrusion, detention and search illegal under *Payton v. New York*, —— U.S. ——, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980) and held that there were no exigent circumstances to justify arresting the respondent without a warrant. The court also relied on Ark. R. Crim. Proc. 10.1(a), Ark. Stat. Ann. Vol. 4A at 457 (Repl. 1977), which defines "search" as "any intrusion

other than an arrest." While the majority's reliance on Rule 10.1(a) implies that the court found that respondent was not actually arrested by police, it also quoted Officer Hutchinson's testimony that he arrested respondent. With regard to the search warrant, the majority stated: "Admittedly, there was no search warrant; therefore, the search and the seizure prior to the receipt of the warrant were not authorized." *Haynes v. State,* 269 Ark. Adv. Sh. 506, 512 (1980).

The minority found that while the seizure of the marijuana might have been the result of an unreasonable search, the seizure of the LSD was made pursuant to a valid search warrant. It found sufficient evidence that respondent's arrest had been made pursuant to exigent circumstances and probable cause, finding that there was evidence of "a compelling need for official action in the form of an arrest and 'securing the area' of the intended search." The minority based its dissent on the fact that there was sufficient evidence to uphold the findings of the trial court, which should not have been reversed absent a finding that they are clearly against the preponderance of the evidence. 269 Ark. Adv. Sh. at 517.

Petitioner filed a timely petition for rehearing, which was denied without opinion by per curiam order entered on August 25, 1980. Reference to that order is made at 270 Ark. Adv. Sh. Vol. 1 (unnumbered page) (August 25, 1980).

NO. ————

STATE OF ARKANSAS,

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WILLIAM THOMAS HAYNES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REASONS FOR GRANTING THE WRIT

I. THE ARKANSAS SUPREME COURT ERRONEOUSLY INTERPRETED AND APPLIED *PAYTON v. NEW YORK*, —— U.S. ——, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980) IN REVERSING THE CONVICTION IN THIS CASE.

In *Payton v. New York*, —— U.S. ——, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), this Court held that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."

In *Payton*, police assembled enough evidence to establish probable cause that Payton had committed a murder. They went to his apartment without a warrant, used a crowbar to break down the door and entered. They found no one there, but they seized a .30-caliber shell casing that was in plain view and which was later introduced into evidence at Payton's murder trial. 63 L.Ed. 2d at 645.

In a companion case, *Riddick v. New York*, police officers, without a warrant, entered the home of the defendant nine months after he was identified as the robber by the victims of two armed robberies and about two months after the police learned his address. The officers searched the house and seized narcotics and related paraphernalia from a chest of drawers. Riddick was subsequently indicted on narcotics charges, and the trial court denied a motion to suppress the evidence seized at the time of the arrest. 63 L.Ed. 2d at 646.

While *Payton* held specifically that it is a violation of a suspect's constitutional rights to arrest him in his own home without a warrant, the practical effect is to exclude any evidence which may have been seized in conjunction with such an arrest.

The Arkansas Court found *Payton* to be controlling in *Haynes v. Arkansas*, 269 Ark. Adv. Sh. 506, 512 (1980), despite these significant factual differences: (1) the warrantless arrest was made under exigent circumstances; (2) the determination of probable cause to search was made independently of the arrest; and (3) the incriminating evidence used against Haynes at trial was seized pursuant to a valid and unchallenged search warrnt.

A. *Payton* is not controlling because the warrantless arrest was made under exigent circumstances.

This Court specifically noted in *Payton* that, although it was arguable that "the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification." Since the New York Court of Appeals treated both *Payton* and *Riddick* as involving "routine felony arrests in which there was ample time to obtain a warrant," this Court did the same. The Court also noted that these cases did not present the occasion "to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 63 L.Ed. 2d at 648-49. This issue is presented, however, in *Haynes*.

By holding that *Payton* was controlling in *Haynes* and noting that *Payton* did not apply when exigent circumstances existed, the Arkansas Supreme Court at least impliedly held that there did not exist in *Haynes* sufficient exigent circumstances to distinguish it from *Payton*. *Haynes*, 269 Ark. Adv. Sh. at 511-12.

This Court has held that arrests without warrants must be based on probable cause. It defined such probable cause in *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) as:

> facts and circumstances within the officers's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances showing that the suspect has committed, is committing or is about to commit an offense. (Citation omitted.)

This Court has further held that "appropriate police response" should not be thwarted "when a credible informant warns of a specific impending crime." *Adams v. Williams,* 407 U.S. 143, 147 (1972).

Cases involving warrantless arrests almost always involve warrantless searches. Although the warrantless search issue is not present here, it would seem that circumstances sufficiently exigent to justify *both* a warrantless arrest and warrantless search would justify only a warrantless arrest. These exigent circumstances have been enumerated by this Court as "exceptional situations," *Vale v. Louisiana,* 399 U.S. 30 (1970), including the risk of escape of a felon whose whereabouts are known (along with weapons and other evidence of the crime), *Warden v. Hayden,* 387 U.S. 294 (1967); the risk of destruction of evidence, *Cupp v. Murphy,* 412 U.S. 291 (1973); *Schmerber v. California,* 384 U.S. 757 (1966); *United States v. Jeffers,* 342 U.S. 48 (1951); and the risk of contraband goods about to be removed from the jurisdiction, *Chapman v. United States,* 365 U.S. 610 (1961); *Johnson v. United States,* 333 U.S. 10 (1948).

In this case, Detective Donald Hamilton of the Harrison, Arkansas, Police Department testified that his investigation of Haynes began about 8:00 p.m. on April 22, 1978, when a confidential informant told him that Haynes had 55 "blotter hits" of LSD in the refrigerator of his apartment or motel room. (T. 153-154) The police then conducted an intermittent surveillance of Room 114 of the Apple Valley Inn on the night of April 22. On April 23, 1978, at approximately 8:30 p.m., the same informant was searched, given a $5 bill with recorded serial numbers and sent to make a controlled buy from Haynes. (T. 155-156) The informant

was unsuccessful, and the police increased their surveillance to include Room 116 of the Apple Valley Inn, as Haynes had been seen entering and leaving that room also. The informant was again sent in to make a controlled buy and apparently failed a second time. (T. 157-159)

Police then saw one Kenneth Drewry leave Room 116 and stopped him when he pulled into a driveway in a residential area where police knew he did not live. Drewry had made controlled buys for the police before, and he agreed to make one from Haynes. He was taken to the police station, where he was searched and given a $5 bill with recorded serial numbers. Drewry was followed by one police officer until he was within sight of the two officers who were watching the motel. (T. 159-160)

Hamilton next saw Drewry when he returned to the police station and executed signed documents which, along with Hamilton's own affidavits, (T. 26-27; 17-20) were the basis for the later issuance of the search warrant.

Drewry testified that he was stopped by police after he left Room 116 of the motel about 7:30 or 8:00 p.m. (T. 271) and that he volunteered to make a controlled buy from Haynes. (T. 293) He was taken to the police station, then returned to Room 116 of the inn. He gave Haynes the $5 bill previously given to him by the police, and Haynes sold him two hits of LSD. (T. 274-275) A policeman followed Drewry back to the police station, where Detective Hamilton field tested one of the small white tabs of blotter paper sold by Haynes for the presence of LSD. (T. 275-276)

Drewry testified that he had earlier that evening seen Haynes selling LSD to other persons in Room 116. (T. 286, 288-289)

Detective Hamilton testified that when Drewry returned to the police station, he (Hamilton) conducted a standard field test on one of the pieces of paper Drewry bought from Haynes. The results were positive for an hallucinogen, which Hamilton said he had reason to believe was LSD. (T. 173-174) The purpose of conducting the test, Hamilton testified, was to determine that police "were actually going after drugs and not plain white blotter paper." (T. 190)

Officer Galen Hutchinson of the Criminal Investigation Division, Narcotics Enforcement Section of the Arkansas State Police, testified that he was contacted by Detective Hamilton on April 23 to assist in an investigation at the Apple Valley Inn. (T. 191-192) Prior to Drewry's return to the motel, Hutchinson had assisted in watching Rooms 114 and 116, outside which he observed about a half dozen people and several vehicles. (T. 193) Hutchinson was aware that Drewry was supposed to make a controlled buy of narcotics or dangerous drugs from Haynes. (T. 194) After Drewry left, Hutchinson was advised by radio that the buy had taken place, that the field test revealed the presence of an hallucinogen and that a search warrant was being procured. (T. 195)

Detective Robert Post of the Harrison Police Department testified that when he confirmed that the controlled buy had been made, he related that information to Hutchinson. (T. 123)

At that point, Hutchinson said, several people were leaving the vicinity of Rooms 114 and 116, and he feared that the drug was being distributed. He testified that he also believed he had probable cause at that time to arrest Haynes. He then decided "we should go ahead and secure

the rooms and make our arrest of the individuals." (T. 196) Hutchinson testified at the suppression hearing that the decision to arrest Haynes and secure the area was made because he feared both that evidence would leave the motel and that dangerous drugs would get "on the street." (T. 86)

Petitioner will not argue that a motel room cannot be a "home" within the meaning of *Payton*. That argument was probably nullified by *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951), at least with respect to the expectation of privacy in a hotel room being of constitutional dimensions. It would seem obvious, however, that Haynes' "residence" in the motel room gave rise to such an inference of transiency as to support a belief that his flight was a real danger. This is especially true in view of the fact that several of the other visitors at the Apple Valley Inn on the night in question had been alerted that the police were conducting an investigation into drug traffic there. (T. 106) It is not unlikely that one of them would have warned Haynes and given him time to either flee or dispose of the incriminating evidence before an arrest warrant could be obtained. Minutes, perhaps even seconds, were crucial once the first of his friends was alerted to the police investigation.

A second and related factor to consider is the relative ease with which Haynes could have disposed of the contraband. It is certainly not unknown to this Court that disposal of illicit drugs is frequently effected by flushing the evidence down the nearest toilet. The type and quantity possessed by Haynes here certainly seems to be easily subject to such disposal.

Haynes testified that he arrived at the motel room about 9:30 or 10:00 a.m. the morning of his arrest and that he had not been there at all the day before. (T. 67) This is evidence that a belief that he was a transient was justified in fact. He also testified that in September, 1978, he was no longer living in Boone County, where the inn is located. Haynes' father testified that he had only lived at the motel with his son since April 1, 1978, and that they occupied three different rooms before he vacated the premises some time in May, about a month or a month and a half after moving in. (T. 53-54)

It is also clear as a matter of common sense that it would have been far easier for Haynes to gather his personal possessions and flee from a motel room than it might have been if he had established permanent residence in a house or an apartment. The mere fact of living in a motel, coupled with the testimony regarding the transiency of the father and son, makes it clear that their residence, even if sufficient for some purposes under the Fourth Amendment, was intended to be temporary. The police had every reason to believe that Haynes was prepared to flee their jurisdiction at a moment's notice. They also had every reason to believe that notice was likely to be imminent.

A third reason that exigent circumstances existed here is that the police were fully aware that Haynes had already sold some of his store of controlled substances that evening. As at least two of the officers testified, they were concerned that additional drugs would be sold if he were not taken into custody immediately after the sale to the informant was confirmed. (T. 86, 106)

The exigent circumstances present in this case, then, were the danger of Haynes' immediate flight, either tem-

porary or permanent, from his temporary living quarters and the danger that the drugs would be either disposed of or distributed before his apprehension.

The facts outlined above support Hutchinson's belief that sufficient exigent circumstances were present to justify the warrantless arrest of Haynes. The action taken here seems to fit well into this Court's dictum in *Payton* noting that even the appellants there conceded that "if an exigency arises necessitating immediate arrest in the course of an orderly investigation, arrest without a warrant is permissible." *Payton,* 63 L.Ed. 2d at 660 n. 55.

Petitioner's position here is bolstered by the dissent of the three-justice minority of the Arkansas Supreme Court in *Haynes.* The dissenting opinion, written by Mr. Chief Justice Fogleman, found adequate evidence of exigent circumstances, probable cause for the warrantless arrest of Haynes and evidence of a "compelling need for official action in the form of an arrest and 'securing the area' of the intended search." *Haynes,* 269 Ark. Adv. Sh. at 513-17.

Petitioner therefore submits that *Payton* is not controlling in *Haynes* and does not require a reversal of Haynes' conviction. Although the warrantless arrest may be more suspect in light of *Payton,* exigent circumstances existed to justify prompt police action. This case also presents an excellent opportunity for this Court to hold squarely what exigent circumstances need be present to distinguish such cases from *Payton.*

The Court should grant this petition for writ of Certiorari because the Arkansas Supreme Court erroneously held that the the circumstances existing in *Haynes* were not sufficiently exigent to distinguish it from *Payton.* This

case also presents an opportunity for this Court to define "exigent circumstances" as used in *Payton*, an important question of federal constitutional law which has not been, but should be, decided.

B. *Payton* is not controlling because a valid search warrant was obtained independently of the arrest, and the evidence introduced at trial was seized pursuant to that warrant.

Even if the arrest of Haynes were found to be illegal under *Payton*, the subsequent search was made pursuant to a valid search warrant. That warrant rendered the search itself valid and rendered admissible any evidence obtained under authority of the warrant.

The search warrant itself (T. 21-22) and the affidavits on which it was based (T. 17-20) were challenged by Haynes in a pretrial motion *solely* on the ground that the warrant was tainted because it was procured while Haynes was being detained in his motel room by police. (T. 12) The trial court denied the motion to suppress after a pretrial hearing. (T. 131) Haynes conceded on direct appeal that the search warrant and the affidavits in support thereof were not challenged at trial. He did not raise the issue of the validity of the warrant or affidavits on appeal. His argument was based on the premise that Haynes was not arrested before the search warrant was executed and that his detention by police to secure the area while awaiting the search warrant was instead an intrusion tantamount to an illegal search under Ark. R. Crim. Proc. 10.1(a), Ark. Stat. Ann. Vol. 4A at 457 (Repl. 1977).

The findings of the Arkansas Supreme Court on this issue are not clear. The majority apparently agreed with

Haynes that the entry of the police officers into the motel room was an intrusion tantamount to an illegal search under Ark. R. Crim. Proc. 10.1(a), Ark. Stat. Ann. Vol. 4A at 457 (Repl. 1977). The Arkansas Court apparently disregarded testimony by Officer Galen Hutchinson both at the suppression hearing and at trial that he placed Haynes under arrest and informed him of his *Miranda* rights almost immediately after entering the motel room. (T. 96, 198, 210) The fact that Haynes was arrested removes the detention from the definition of "search" in Ark. R. Crim. Proc. 10.1 (a). The court also apparently disregarded testimony by three police officers that the room was not searched until after the search warrant was served. (Hutchinson, T. 88, 198; Lucas, T. 109, 218; Post, T. 127, 242) This testimony was corroborated by Haynes' father, who was also his roommate. (T. 64-65)

Even Haynes, who testified at both the suppression hearing and at trial, never contended that the police officers searched for or discovered any of the seized evidence (except a small quantity of marijuana hidden in a film canister) prior to the arrival of the search warrant. (T. 73-75)

The Arkansas Court apparently treated the case as if no warrant was properly obtained and executed. It did note the existence of the warrant, however. *Haynes*, 269 Ark. Adv. Sh. at 511. Near the end of its opinion, the majority makes this internally inconsistent statement: "Admittedly, there was no search warrant; therefore, the search and the seizure prior to the receipt of the warrant were not authorized." 269 Ark. Adv. Sh. at 512.

The three-judge minority found acceptable the holding that the seizure of the marijuana (apparently that

found in the film canister) was unreasonable. It found the seizure of the LSD, however, to be "the fruit of a search pursuant to a search warrant which the officers were unable to produce until 3 1/2 hours after they knew there was a probable cause for a search of the motel room in which it was found." It further found the facts of the case to reflect a "successful search pursuant to a proper warrant." 269 Ark. Adv. Sh. at 513. The minority also found that "Hutchinson carefully limited the intrusion by not actually conducting a search for evidence (contraband) until the search warrant arrived. There was an evidentiary basis for a finding that he did not extend his intrusion beyond the scope reasonable (*sic*) related to the initial interference." 269 Ark. Adv. Sh. at 516.

No exigent circumstances are required to justify the search, as it was based on a valid warrant, issued subsequent to, but independent from, the arrest. Here the procedure for obtaining the search warrant had been put into motion even before probable cause to arrest had been determined to exist and before the officers entered the motel room. (T. 109, 195) The only connection between the arrest and the search was that the controlled buy by the confidential informant was the determinative factor for a finding of probable cause in both police actions. The search, in short, was not made incident to the arrest.

The Fourth Amendment right to be free from searches is not unlimited. This Court has held that the Fourth Amendment allows intrusions upon privacy "made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a 'neutral and detached magistrate. . . .' " *Warden v. Hayden,*

387 U.S. 294, 309 (1967), quoting *Johnson v. United States*, 333 U.S. 10 (1948).

The search warrant here was issued pursuant to the sworn affidavits of the police officer, Hamilton, who had been conducting the investigation, based on the information he had received from two previously reliable informants and his own personal knowledge of the circumstances surrounding the controlled buy. It was issued by a municipal judge after a hearing, part of which is transcribed. (T. 23-25) The judge's attention to detail regarding the particularity of the warrant is illustrated by his refusal to let officers search two vehicles originally listed on the warrant and his limiting the search only to the 1974 Ford Courier belonging to Haynes. (T. 21, 23-24) The three requirements of *Hayden* were met, and the sufficiency of the warrant itself has never been challenged by Haynes.

The Arkansas Court therefore erred when it held that the evidence seized pursuant to the warrant should have been suppressed. It also erred in finding *Payton* to control, as *Payton* did not involve the procurement of a valid search warrant prior to the search and seizure. This Court should grant the petition for writ of certiorari to clarify that the *Payton* rule does not apply in cases in which a valid search warrant is properly obtained and executed.

II. THE EVIDENCE AT ISSUE IN THIS CASE WAS ADMISSIBLE UNDER *RAWLINGS v. KENTUCKY*, 48 U.S.L.W. 4885 (U.S. June 25, 1980) (No. 79-5146).

The facts of this case which distinguished it from *Payton* also make applicable this Court's reasoning and holding in *Rawlings v. Kentucky*, 48 U.S.L.W. 4885 (U.S.

June 25, 1980) (No. 79-5146). *Rawlings* was filed less than two weeks before the Arkansas Supreme Court filed its opinion in *Haynes*, which did not cite *Rawlings*.

In *Rawlings* police officers arrived at the residence of one Marquess with a warrant for his arrest. Marquess was not at home, and while the officers were searching the house for him, they smelled marijuana smoke and saw marijuana seeds. Two officers left to procure a search warrant, and the others detained one resident of the house and four visitors. Officers refused to let anyone leave the premises unless he or she agreed to a body search. The occupants of the house were detained for approximately 45 minutes until the search warrant arrived. When the police began their search, petitioner claimed ownership of drugs found by the police in the purse of another person detained. Police immediately searched the petitioner and placed him under arrest after finding $4,500 and a knife on his person.

The major issue of *Rawlings* involved the admissibility of petitioner's admission that he owned the drugs, alleged to be the fruit of an illegal detention. This Court held, however, that the statements were made voluntarily as "acts of free will unaffected by any illegality in the initial detention." 48 U.S.L.W. at 4888.

The Court also upheld the search of petitioner's person as incident to his formal arrest. It specifically did not find significant the fact that the search preceded the arrest.

Rawlings is obviously not squarely on point with this case. However, its similarities make it much more analogous than *Payton*.

The first of the similarities is the fact that the petitioner in *Rawlings* was detained pending the arrival of a search

warrant. It should be noted that the detention was based on information gained by the police *after* entering the house with a warrant for someone who was not arrested at that time. In *Haynes*, the decision to arrest and detain the defendant was made almost simultaneously with an independent decision by other police officers to secure a search warrant based on probable cause determined to exist before police officers ever talked with Haynes or entered his room. The propriety of the police action in *Haynes* is even greater than that in *Rawlings* because Haynes was immediately placed under arrest when the officers entered his room. Haynes bottomed his allegation of violation of the Fourth Amendment on his contention that his detention by police tainted the search and the evidence seized. Since Haynes was placed under arrest, he could have been detained instead at the police station, and it has never been quite clear how being detained in his own room could be more violative of his rights than if he had been transported to jail and detained there.

It is clear that, absent the exigent circumstances outlined in Point I(a) of this petition, Haynes' arrest would have been illegal under *Payton*. This issue is further confused by the fact that the majority opinion in *Haynes* did not clearly hold that the circumstances surrounding Haynes' arrest were not sufficiently exigent.

Even if the arrest of Haynes or the "illegal intrusion" found by the Arkansas Court did not withstand Fourth Amendment scrutiny, however, *Rawlings* would still allow the admissibility of the seized evidence. This is especially true since the police in *Haynes* had a valid warrant to search the premises, an even stronger justification for the search of his motel room than the (apparently erroneous)

belief of the police in *Rawlings* that the warrant to search Marquess' house also justified their search of the petitioner's person and another occupant's purse.

The particular language of *Rawlings* which supports by analogy the State's position here is this:

> The officers who detained petitioner and his companions uniformly testified that they took those measures to avoid the asportation or destruction of the marihuana they thought was present in the house and that they believed that a warrant authorizing them to search the house would also authorize them to search the five occupants of the house. While the legality of temporarily detaining a person at the scene of suspected drug activity to secure a warrant may be an open question, and while the officer's belief about the scope of the warrant they obtained may well have been erroneous under our recent decision in *Ybarra v. Illinois*, —— U.S. ——, 100 S.Ct. 338, 62 L.Ed. 2d 238 (1979), the conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements. *Rawlings*, 48 U.S.L.W. at 4888 (footnote omitted).

If the statements made during such an arguably illegal detention without arrest are not tainted by that detention, it is hard to imagine how evidence seized only after the execution of a valid search warrant could be tainted by Haynes' detention, whether he was under arrest or not.

Even more supportive of the State's position here, how-

ever, is the admissibility of the evidence seized from the person of the petitioner in *Rawlings*. That search was only arguably under color of a warrant to search a residence not belonging to the petitioner. If evidence seized in that manner was not tainted either by the officers' misunderstanding of the scope of their warrant or by the illegal detention, it is difficult to understand how the evidence seized from Haynes' motel room could have been tainted by the detention alone.

The petitioner in Rawlings was only an unsuspecting bystander wholly unrelated to the investigation which resulted in his arrest. The serendipitous events leading to his arrest netted the police an additional suspect notwithstanding their circumlocutory methods of establishing probable cause to search and arrest him.

Haynes, on the other hand, was the actual suspect at whom an orderly police investigation was aimed. Surveillance and information received from reliable informants, when coupled with the strictly controlled buy, enabled the police in *Haynes* to determine before they acted that probable cause existed to arrest Haynes and to search his room.

This Court seemed to find a great deal of significance in the apparent good faith of the officers in *Rawlings*. Although the good faith of the officers there remains unquestioned, it was not as clearly demonstrated as that of the police officers in *Haynes,* who exercised restraint and refused to act at all until a determination of probable cause had been reasonably made. The police officers involved in the *Haynes* investigation exhibited a significantly higher degree of awareness of and respect for that defendant's Fourth Amendment rights than did those in *Rawlings*.

There was certainly no "conscious or flagrant misconduct requiring prophylactic exclusion" of the evidence seized.

If the basic purpose of the exclusionary rule is to deter illegal police action, it is hard to believe that the rule is aimed at such reasoned and restrained police actions as those taken by the officers in *Haynes*. If it is, however, the police will be severely hampered in their efforts to control traffic in illegal narcotics and dangerous drugs. Control or elimination of that traffic is obviously considered to be in the best interest of the public. There is a delicate balance between the interest of the public in the control of drug traffic and its interest in deterrence of Fourth Amendment violations. Whatever deterrent value there might be in excluding the evidence seized in *Haynes* seems far outweighed by the value of preventing the further distribution of LSD. This is especially true when the police made every reasonable effort to comply with Fourth Amendment requirements.

CONCLUSION

The Arkansas Supreme Court held in *Haynes v. State*, 269 Ark. Adv. Sh. 506 (1980) that this Court's recent decision in *Payton v. New York*, —— U.S. ——, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980) was controlling in that case. Because the facts of *Haynes* are not analogous to those of *Payton*, the Arkansas Court incorrectly interpreted the reasoning and erroneously applied the holding of *Payton*.

Rule 17.1(c) of the Rules of the Supreme Court of the United States states that one of the considerations of this Court in determining whether to grant a petition for a writ of certiorari is whether a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The Arkansas Supreme Court's opinion in *Haynes* is in conflict with both *Payton* and this Court's more recent decision in *Rawlings v. Kentucky*, 48 U.S.L.W. 4885 (U.S. June 25, 1980) (No. 79-5146). It is also in conflict with earlier cases in which this Court defined the "exigent circumstances" which justify warrantless arrest. *See, e.g., United States v. Jeffers*, 342 U.S. 48 (1951). It is still further in conflict with cases in which this Court has upheld the constitutionality of searches made pursuant to valid warrants. *See, e.g., Warden v. Hayden*, 387 U.S. 294 (1967).

By impliedly finding that no exigent circumstances existed in *Haynes* and applying *Payton*, the Arkansas Court also decided that the circumstances which existed in *Haynes* are not the "exigent circumstances" this Court held could be the basis for an exception to the *Payton* rule. A

definition and interpretation of that term as it applies specifically in *Payton* is an important question of federal law which has not been, but should be, settled by this Court. The question specifically presented is whether the actions of the police in *Haynes* constitute an illegal arrest or detention under *Payton.*

The Arkansas Court also held that the initial intrusion into Haynes' motel room was tantamount to the instituting of a search and that any evidence seized thereafter (even apparently under color of a valid search warrant) should be excluded under *Payton.* While this holding was also based on a state rule of criminal procedure, the Arkansas Court's reliance on *Payton* erroneously interprets it to require that the evidence be excluded under that case, rather than solely under the state procedural rule. Assuming that the arrest, detention, or "intrusion" in *Haynes* was illegal, which the State does not concede, another important question of federal law which should be decided by this Court is whether the execution of a valid search warrant removes any taint of an arrest illegal under *Payton* and thereby renders the evidence admissible.

In addition, this Court acknowledged in *Rawlings* that the question of legality of a lengthy detention by police while awaiting the arrival of a search warrant was still an open question. 48 U.S.L.W. at 4888. This is an additional question of federal law which is squarely presented in this case and should be decided by this Court.

The Arkansas Supreme Court's opinion in *Haynes* is in conflict with no less than four of this Court's previous opinions. The Arkansas Court also decided erroneously at least three important questions of federal law which this Court has never squarely addressed and which should be

decided. There are, therefore, seven reasons why this Court should grant this petition for writ of certiorari under the provisions of Rule 17.1(c) and vacate the reversal of Haynes' conviction.

The facts of *Haynes* are obviously more nearly like those of *Rawlings* than those of *Payton*. The Arkansas Court apparently did not consider *Rawlings* in rendering the *Haynes* opinion, as *Rawlings* is neither cited nor discussed in that opinion. If nothing else, this Court should grant this petition for writ of certiorari and remand Haynes for reconsideration in light of *Rawlings*.

Respectfully submitted,

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Appendix "A"

William Thomas HAYNES v. STATE of Arkansas

CR 80-62

Opinion Delivered July 7, 1980

Appeal from Boone Circuit Court, *Robert W. McCorkindale II,* Judge; reversed and remanded.

E. Alvin Schay, State Appointed Defender, by: *John Jones,* Deputy, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of possession of marijuana, possession of LSD with intent to deliver, and delivery of LSD. He was fined $1,000 and sentenced to one year in jail on the marijuana charge and was fined $15,000 and sentenced to the Department of Correction for 20 years on each of the other two charges. The jail time merged with the Department of Correction sentences which were to run consecutively.

On appeal appellant urges three points for reversal. (1) The court failed to grant appellant's motion to suppress certain evidence. (2) The sentence resulted from passion and prejudice and was cruel and unusual. (3) The trial court failed to sentence appellant pursuant to the Youthful Offender's Act. We agree with appellant's first contention but disagree with the second and third arguments.

Appellant lived with his father in room 114 of the Apple Valley Inn in Harrison, Arkansas, at the time the events considered here occurred. Other persons occupied room 116. The police became suspicious that drugs were

being distributed from the motel and began an investigation. Apparently, room 116 received most of the visitor traffic, but there was some testimony that several people were in and around rooms 115 and 114, also.

About 8:00 p.m. on April 23, 1978, the officers decided to make a controlled purchase through a reliable informant. The officers moved into an observation post from which they observed five people known to them, plus several more unknown to them, in and around room 116. Detective Post stated:

> Well, they were all over, and, there were cars there and I can't remember what kinds of cars they were and all these individuals were outside and going inside room 116, back and forth and standing outside talking.

Sergeant Lucas testified that he observed the informant arrive on the scene at approximately 11:00 p.m. and that he saw the appellant emerge from room 114 and strike up a conversation with the informant in the parking lot. Shortly thereafter, the informant and the appellant entered room 116 where they stayed a few minutes, and the informant left. The informant later reported that he had been successful in buying drugs from the appellant. Although the record is silent, it is apparent that the purchase was completed in room 116. Lucas further testified that the people he observed were in room 115 or 116 but not in room 114. All of the people he saw arriving and departing were from room 116. He also testified that after the informant and appellant left room 116, the appellant returned to room 114 where he resided with his father.

The officers then decided it was time to secure the area; and, on command, they charged the motel and kicked down

the door of rooms 115 and 116. Room 115 was vacant and only two people were in room 116. After discovering appellant was in neither room, they proceeded to room 114 where they entered without permission and without a warrant. At this time, other officers were attempting to obtain a search warrant, however, it took approximately three and a half hours for the warrant to arrive. In the meantime, the officers moved appellant's father out of his own room and placed him in room 115 until the search warrant arrived. Appellant and at least one officer stayed inside room 114 for approximately three and a half hours. The officers admitted they did not have permission to enter room 114 as they were not there under friendly circumstances.

The evidence is in considerable dispute about what occurred while the officer remained in room 114 waiting for the search warrant, and it is uncertain when or if the appellant was arrested. Officer Post stated:

> I did not tell them they were under arrest, but I did advise the defendant of his rights. This was when I walked into room 114. I asked Officer Hutchinson if the defendant had said anything, and he said he had not.

The officer testified that after a considerable amount of discussion the appellant finally stated that the only drugs he had were in a dresser drawer and that appellant went to the dresser drawer, opened it, and got a container with the marijuana in it. The officer opened the canister, looked in and saw the marijuana, and told appellant to replace it in the drawer. After the search warrant arrived, about 3:00 a.m. the police took possession of the marijuana again, and, they also discovered LSD with a market value of $58.

The crucial question to be considered by the court is whether the evidence seized should have been suppressed.

Arkansas Rules of Criminal Procedure, Rule 10.1(a), states:

> "Search" means any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

It seems quite clear that there was an intrusion into appellant's place of abode at the time of this "seizure." Since an intrusion without legal authority is a violation of one's individual rights under the Constitutions of the United States and the State of Arkansas, this visit amounted to an illegal intrusion or search. Rule 10.1(a) is nothing more than an explanation of a meaning of the word "search". The officers obviously were acting under color of authority and were on the appellant's property for the purpose of seizing individuals or things. There is no question there was no consent to this intrusion.

Arkansas Rules of Criminal Procedure, Rule 14.3, states:

> An officer has reasonable cause to believe that premises or a vehicle contain:
>
> (a) individuals in imminent danger of death or serious bodily harm; or

(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent necessary for the prevention of such death, bodily harm or destruction.

It is quite clear that this was not an emergency search as defined by the above-quoted rule. We have always construed the Fourth Amendment to prohibit entry into one's home, without a warrant, for any reason; except, exigent circumstances have been determined to allow a warrantless intrusion. Absent exigent circumstances such an intrusion is not permitted. *Payton v. New York,* —— U.S. ——, 100 S.Ct. 1371 (1980). We do not believe any provision of the constitution permits officers without a warrant to break down doors, to enter the premises of an individual, and to detain him for several hours while waiting for a search warrant. Using an old cliche, a man's home is his castle; and, it should be free from intrusion by outsiders, including the government and its officers. The United States Supreme Court has confirmed the statement that illegal entry into a person's home is the chief evil guarded against by the Fourth Amendment. *United States v. United States District Court,* 407 U.S. 297 (1972); *McDonald v. United States,* 335 U.S. 451 (1948).

In *Riddick v. New York,* —— U.S. ——, 100 S.Ct. 1371 (1980), which is a companion case to *Payton v. New York,*

supra, it was held that when the police entered a residence without a warrant and seized evidence, the evidence thus obtained was inadmissible. In both *Payton* and *Riddick*, the trial court and the appellate court refused to suppress the evidence obtained in these two cases. In *Payton* the police knocked on his door; and, when there was no response, they knocked in the door and seized a spent cartridge which was in plain view. In Riddick's case the police knocked on his door; and, when his young son opened the door, the police saw Riddick sitting in bed, entered his residence, and arrested him. Before permitting him to dress, they opened a chest of drawers and found narcotics and related paraphernalia which resulted in Riddick's arrest and aided in his conviction. Both of these cases were reversed by the United States Supreme Court. It was held that the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

The opinion of the Court in *Payton v. New York*, supra, and *Riddick v. New York*, supra, is represented by the following statement:

> It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well-settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open

> area and such a seizure on private premises was plainly stated in G. M. Leasing Corp. v. United States, 429 U.S. 338, 354, 50 L.Ed 2d 530, 97 S.Ct. 619: * * *

It is obvious that this case is controlling on the matter before us at this time.

We know of no statutory or other right which enables the officers to take the action which was described by Officer Hutchinson when he stated:

> I told him that he was under arrest for the sale of a controlled substance and advised him of his constitutional rights, per Miranda, and seized the room until the search warrant could arrive.

Certainly, seizing the room is as much of an invasion of privacy as searching the room. Admittedly, there was no search warrant; therefore, the search and the seizure prior to the receipt of the warrant were not authorized.

We are unable to say from the record that the sentence was a result of passion or prejudice or that it was a clear abuse of the trial court's discretion. Also, we point out that the Youthful Offender's Act, Ark. Stat. Ann. §43-2339 (Repl. 1977), is discretionary, and we find no abuse of that discretion.

Reversed and remanded.

FOGLEMAN, C.J., GEORGE ROSE SMITH and STROUD, J.J., dissent.

JOHN A. FOGLEMAN, Chief Justice, dissenting in part. I could accept a holding that the seizure of the marijuana in this case was the result of an unreasonable search and seizure, but I do not agree that the seizure of the LSD was

e result of an unreasonable search. It was the fruit of a search pursuant to a search warrant which the officers were unable to produce until 3 1/2 hours after they knew there was a probable cause for a search of the motel room in which it was found. The officers who remained at the scene restrained themselves admirably except for the questionable episode relating to the marijuana. Perhaps the circumstances were not so exigent as to permit a search without a warrant, but Haynes did not have a constitutional right to flush his remaining inventory of LSD down the commode. Yet this is the unarticulated effect of the majority opinion. That is the only way that it can be said that the successful search pursuant to a proper warrant was the fruit of an unlawful intrusion.

In viewing this matter, it seems to me that the majority, in making its independent determination of the reasonableness of the search, has given no weight whatever to the finding of the trial judge that the search was reasonable. The holding in *Payton v. New York & Riddick v. New York*, —— U.S. ——, 100 S.Ct. ——, 63 L.Ed. 2d 639 (1980), relied upon by the majority is strictly limited to arrests made in the absence of exigent circumstances. Throughout all the spate of its decisions during the past quarter of a century dealing with the Fourth Amendment warrant requirements in the light of what has been called the amorphous word, "reasonableness", the United States Supreme Court has consistently recognized an exception to the warrant requirement in exigent circumstances, both in cases where a search was sustained as reasonable and where suppression was required because a warrantless search or seizure was unreasonable. See, e.g., *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *McDonald v. United*

States, 335 U.S. 451 69 S.Ct. 191, 93 L.Ed. 153 (1948); *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967); *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967); *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 564 (1971); *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L. Ed. 2d 290 (1978). In *Payton,* the court specifically recognized that a different result might have been reached had the state found exigent circumstances, which arguably existed. In *Riddick,* there was no suggestion of exigent circumstances. In *Warden,* it was said that neither entry nor search is invalid where the exigencies of the situation make the course of action taken by the police imperative. The fact that the contents of the place to be searched might never be found again is a pertinent consideration in determining the reasonableness of the police action. See *Chambers v. Maroney,* supra. It is universally recognized that the danger of destruction of evidence, particularly contraband, is one of the most important factors in considering whether the circumstances were sufficiently exigent that action without a warrant is reasonable. See *United States v. Santana,* 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed. 2d 300 (1976) *Cupp v. Murphy,* 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed. 2d 900 (1973), and cases above cited.

There was evidence of exigent circumstances in this case. There was probable cause for the arrest of Haynes. The officers who arranged for the informant to purchase the controlled substance from Haynes proceeded immediately to obtain a search warrant and informed the state

trooper, Hutchinson, a specialist in the enforcement of laws governing narcotics. Hutchinson said that he observed that a great many people were involved and many were leaving and he judged that the officers were running the serious risk of losing other evidence and having dangerous drugs get out on the street, so he decided that he and the officers still present should "secure" the area. He said that after he had gone to room 116 and Sgt. Lucas to room 115, he proceeded to room 114, where he found the door ajar, knocked on it, identified himself as a police officer, and said that he wanted to speak to Tommy Haynes and that he was there for a drug investigation. Hutchinson said that, after hearing a voice saying, "I am Tommy Haynes. What do you want?", he entered the room, identified himself, and asked if the younger of two persons there was Tommy Haynes and, upon receiving an affirmative response, confirmed the identification by asking for the person's driver's license. Haynes testified that when he identified himself, Hutchinson asked him to step outside. He said that Hutchinson stated that he was conducting an investigation and had come to secure the area and that he (Haynes) responded, "Okay, go ahead." According to Hutchinson, he placed Haynes under arrest for sale of a controlled substance and advised him of his rights a few minutes later when Officer Post arrived. Hutchinson said his basic concern was putting the individuals under arrest and preventing any further disposition of the evidence.

In *Freeman v. State,* 258 Ark. 617, 527 SW2d 909, we held that the state had failed to show exigent circumstances to justify the warrantless seizure of an automobile. We said that there was no evidence that there was any danger that people in an automobile, from which the accused was taken

when arrested, might remove the vehicle from the premises before a warrant could be issued, but that if that danger did exist, no reason appeared why two officers, other than those who made the arrest but were present when the arrest was made, could not have maintained a guard sufficient to prevent the removal of this evidence or why additional officers could not have been summoned to lend assistance in this respect. This was a clear recognition that circumstances that were not exigent might become so by subsequent developments.

In a narcotics case, it has been recognized that once the accused, who had recently made a sale to one making a "controlled buy" arranged by an undercover officer, saw the police, there was a realistic expectation that a delay would only result in destruction of the evidence. *United States v. Santana,* supra. There a warrantless arrest and search were found reasonable. In *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978), the court pointed out that its decisions had recognized that a warrantless entry by criminal law enforcement officers may be legal when there is compelling need for official action and no time to secure a warrant. The inquiry is a dual one — whether the actions of the officer were justified in their inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Cupp v. Murphy,* supra. A warrantless "search" must be strictly circumscribed by the exigencies which justify the intrusion. *Mincey v. Arizona,* supra.

In this case the evidence clearly showed that there were exigent circumstances to support the action of Hutchinson. A rather general exodus from the motel premises among the frequenters of room 116 and its

environs commenced after the controlled buy. It became apparent to Hutchinson, whose expertise as a narcotics officer is not to be ignored, that there was a reasonable probability that Haynes would join the exodus, with or without his remaining inventory of LSD. If he took it, it would undoubtedly surface on the street. If he did not, there was a strong likelihood that it would have "gone down the drain." There certainly was a reasonable expectation that evidence would be destroyed, or that, in any event, it would never be found if the arrival of a search warrant was awaited. It was certainly reasonable to believe that there was a compelling need for official action in the form of an arrest and "securing the area" of the intended search. There was certainly a basis for finding that the actions of the officer were justified in their inception. Hutchinson carefully limited the intrusion by not actually conducting a search for evidence (contraband) until the search warrant arrived. There was an evidentiary basis for a finding that he did not extend his intrusion beyond the scope reasonably related to the initial interference.

In its totally independent determination of the reasonableness of the officer's action, the majority has ignored a basic factor of that review. We should give respectful consideration to the findings of the trial court and considerable weight in the resolution of evidentiary conflicts. *Harris v. State,* 244 Ark. 314, 425 SW 2d 293; *State v. Osborn,* 263 Ark. 554, 566 SW2d 139. We should accord the trial court's findings such weight that we will not overturn them unless they are clearly against the preponderance of the evidence. *Degler v. State,* 257 Ark. 388, 517 SW2d 515; *State v. Osborn,* supra. I respectfully submit that the majority has given no consideration to the findings of the trial

court. I do not see how it can be said that the trial court's finding was clearly against the preponderance of the evidence. This decision will do nothing to counter the growing dissatisfaction with the exclusionary rule.

I would affirm the judgment.

I am authorized to state that Mr. Justice GEORGE ROSE SMITH and Mr. Justice STROUD join in this opinion.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF ARKANSAS,
Petitioner

vs.

WILLIAM THOMAS HAYNES,
Respondent

No. 80-691

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, by his attorney, Jackson Jones, Deputy State Appellate Defender, hereby moves that he be allowed to proceed in forma pauperis in this Court for the reasons set out in the affidavit accompanying this motion.

The respondent proceeded in forma pauperis in the trial court and on appeal to the Arkansas Supreme Court.

Respectfully submitted,

JACKSON JONES
Deputy State Appellate Defender
1515 Building, Suite 714
Little Rock, Arkansas 72202
(501) 370-5515

Attorney for Respondent

CERTIFICATE OF SERVICE

I, Jackson Jones, hereby certify that a copy of the foregoing motion for leave to proceed in forma pauperis was hand-delivered to Victra L. Fewell, Assistant Attorney General of Arkansas, one of the attorneys for the petitioner, at her office in the Justice Building, Little Rock, Arkansas, on this 21st day of November, 1980.

JACKSON JONES

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner

vs.

WILLIAM THOMAS HAYNES,
Respondent

No. 80-691

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, William Thomas Haynes, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, or comply with this Court's printing requirements, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in my response to the petition for writ of certiorari are the following: the decision of the Arkansas Supreme Court in the above-entitled case was correct; even if there was a federal question involved in this case which was wrongly decided, the judgment of the Arkansas Supreme Court was based upon an adequate and independent nonfederal or state ground.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the State's petition for writ of certiorari, and for briefing the case on the merits if required, are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
   MAY 13, 1978

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I proceeded in forma pauperis in the state trial court and on appeal to the Arkansas Supreme Court.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William T. Haynes
WILLIAM THOMAS HAYNES

STATE OF ARKANSAS)
)
COUNTY OF LINCOLN)

SUBSCRIBED AND SWORN TO before me this 21 day of November, 1980.

NOTARY PUBLIC

My Commission Expires:

[illegible] 10 11-81

CERTIFICATE OF MAILING

I, Jackson Murry Jones, am a member in good standing of the Bar of this Court. I hereby state pursuant to Rule 28 of the Rules of the Supreme Court that the requisite number of copies of the respondent's brief in opposition to petition for writ of certiorari (No. 80-691) was placed in the United States mail, postage prepaid (first class), addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543, on the 21st day of November, 1980. The brief is due to be filed on November 23, 1980.

Jackson Jones
JACKSON JONES

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

Sworn to and subscribed before me this 21st day of November, 1980.

Sherry Brannon
NOTARY PUBLIC

My Commission Expires:

8-1-81

CERTIFICATE OF SERVICE

I, Jackson Murry Jones, Deputy State Appellate Defender, hereby certify that a copy of the foregoing brief in opposition to petition for writ of certiorari (No. 80-691) was hand-delivered to Victra L. Fewell, Assistant Attorney General of Arkansas, one of the attorneys for the petitioner, Justice Building, Little Rock, Arkansas, on this 21st day of November, 1980.

Jackson Jones
JACKSON JONES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF ARKANSAS — PETITIONER

VS.

NO. 80-691

WILLIAM THOMAS HAYNES — RESPONDENT

BRIEF IN OPPOSITION
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

E. ALVIN SCHAY
State Appellate Defender

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

Whether the Arkansas Supreme Court erroneously reversed the respondent's conviction because of the introduction of evidence seized from the respondent's apartment several hours after police officers had made a warrantless and non-consensual intrusion into the apartment under non-exigent circumstances and seized, or "secured", the apartment and the persons (respondent and his father) therein while other officers applied for and obtained a search warrant.

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28 U.S.C. Sec. 1257(3)

CONSTITUTIONAL PROVISIONS AND RULES

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

(N)or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Constitution of Arkansas, Article 2, Section 15:

The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 10.1(a):

"Search" means any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 13.2(c):

Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;

the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 14.3:

An officer who has reasonable cause to believe that premises or a vehicle contain:

(a) individuals in imminent danger of death or serious bodily harm; or

(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 16.2(e):

. . . A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;

(iii) the extent to which the violation was willful;

(iv) the extent to which privacy was invaded;

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(v) the extent to which exclusion will tend to prevent violations of these rules;

(vi) whether, but for the violation, the things seized would have been discovered; and

(vii) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceedings in which the things seized are sought to be offered in evidence against him.

STATEMENT OF THE CASE

The respondent was charged with delivery of LSD, possession of LSD with intent to deliver, and possession of marijuana, all in violation of Ark. Stat. Ann. Sections 82-2601 et seq. (Repl. 1976). Prior to his trial, the respondent filed a motion to suppress evidence (marijuana, LSD, and "marked" money) seized from his apartment on the ground of unlawful search and seizure; after a hearing the motion was denied. On appeal, the Arkansas Supreme Court ruled that the evidence should have been suppressed; therefore, the respondent's convictions were reversed and the case was remanded for a new trial.

The underlying facts may be briefly summarized as follows:

In April 1978 the respondent was living with his father in a room at a motel in Harrison, Arkansas. On April 22, the police received information from an informant concerning the respondent which led the police to place his room under surveillance. (T. 155) The surveillance was continued on April 23. On that date the informant was given "marked" money by the police with which to make a "controlled buy" of drugs from the respondent. The informant was not successful in making the purchase at that time. (T. 157) Later during the evening of April 23, a second informant was given $5.00 in "marked" money with which to make a "controlled buy" from the respondent at the motel (T. 122), and he allegedly did so, at approximately 11:00 p.m., while the police continued to watch the respondent's room. (T. 85) After the "controlled buy" was allegedly made, some of the officers involved in the investigation began the process of applying for a warrant, while another officer, Officer Hutchinson, acting pursuant to his independent judgment,

immediately went to the respondent's room, entered it without the consent of the respondent or his father, who were in the room, and, together with other officers, occupied it until the warrant arrived approximately 3 1/2 hours later. (T. 86, 89, 95, 128) The respondent testified that when Officer Hutchinson entered his room without a warrant he asked him to leave (T. 70), and this testimony was uncontradicted. In fact, the officer admitted that he did not receive permission to enter the room. (T. 94-95, 99; see also T. 56,74) The officer's purpose in entering the room was, in his words, to "seize the room" until an anticipated search warrant arrived. (T. 198) A full-scale search was not conducted until the warrant arrived; however, the officers' occupation of the room before the search warrant was obtained was not entirely passive. The respondent testified that one of the officers, without consent, seized a cannister containing marijuana from a dresser drawer prior to the time the warrant arrived. (T. 73-74) The officer denied that he took the cannister from the drawer and stated that the respondent had given it to him (T. 126), but the officer's own account of the incident reveals that the marijuana was discovered as a result of persistent and impermissible questioning by the officer. The following is a portion of the officer's testimony:

> Q. After you read him his rights, did he make any statement or volunteer any information?
>
> A. Yes, he did.
>
> Q. And how did that come about?
>
> A. I asked him about drugs and he kept saying I don't know what you are talking about and finally he said "Post, all I have is in that dresser drawer," and he went to the dresser drawer and got it out and it was marijuana. (T. 125)

Approximately six ounces of marijuana, 21 "hits" of LSD (approximately 609 micrograms), and the "marked" money used by the informant to make the "controlled buy" were seized from the respondent's apartment and introduced into evidence at his trial over his continuing objections. At the conclusion of the trial, the jury found the respondent guilty as charged and fixed his punishment as follows: for possession of marijuana, 1 year's imprisonment in the county jail and a fine of $1,000.00; for delivery of LSD, 20 years' imprisonment in the state penitentiary and a fine of $15,000.00; for possession of LSD with intent to deliver, 20 years' imprisonment in the state penitentiary and a fine of $15,000.00. The trial court ordered that the two 20-year terms of imprisonment be served consecutively.

ARGUMENT

The respondent submits that this case is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction. The judgment of the Arkansas Supreme Court is correct on the basis of settled constitutional principles announced by this Court. Furthermore, the judgment can be sustained on independent grounds of state law, and thus a review of the judgment on writ of certiorari is inappropriate. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Murdock v. City of Memphis, 20 Wall. 590, 636 (1875).

The ruling of the Arkansas Supreme Court in this case is unexceptionable: police officers in this state will not intrude into a person's home without a warrant for the purpose of searching for or seizing persons or things, unless a true emergency exists. Arkansas Rules of Criminal Procedure, Rule 10.1 and Rule 14.3; Payton v. New York, ___ U.S. ___ (April 15, 1980).

Rule 10.1 of the Rules of Criminal Procedure defines a "search" as

> any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

According to the Commentary to Rule 10.1, the key word in this definition is "intrusion," which is "a term sufficiently broad to encompass any legally cognizable interference with an individual's right to privacy."

Under Rule 10.1, the "search" of the respondent's room actually began when Officer Hutchinson first entered the room -- i.e., when he intruded upon the respondent's property and privacy -- with the ultimate intention of seizing persons or things found there. In the absence of exigent circumstances, the search of the respondent's room was therefore illegal in its inception and could not be transformed into a legal search by the belated production of a warrant.

Rule 14.3 of the Rules of Criminal Procedure authorizes "emergency searches" when exigent circumstances exist:

-1-

An officer who has reasonable cause to believe that premises or a vehicle contain:

(a) individuals in imminent danger of death or serious bodily harm; or

(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent necessary for the prevention of such death, bodily harm or destruction.

The Arkansas Supreme Court correctly found that an emergency, within the meaning of Rule 14.3, did not exist in this case. There was certainly no evidence that the respondent's room contained individuals in danger of death or serious bodily harm; or things likely to burn or explode; or things subject to seizure which would cause or be used to cause death or serious bodily harm if their seizure were delayed. There was even no evidence that the respondent knew that his residence was under surveillance by the police officers, and thus there was no danger that he would feel compelled to destroy any evidence while the officers applied for a warrant.

It is clear that Officer Hutchinson's purpose in entering the respondent's room was not to effect a routine felony arrest culminating in the immediate removal of the arrestee to a police station; his admitted purpose, as noted in the Arkansas Supreme Court's opinion, was to "seize the room" until an anticipated search warrant arrived. Even if the Arkansas Supreme Court had found, however, that the entry of the respondent's room by Officer Hutchinson was for the purpose of making an arrest and was not the initiation of a "search" within the meaning of Rule 10.1, the entry was nevertheless unlawful, inasmuch as it involved a warrantless intrusion into the appellant's home in the absence of exigent circumstances, Payton v. New York, supra, and the court was justified in applying the exclusionary rule in this case to deter such illegal entries into homes as occurred here. Rule 16.2(e) of the Rules of Criminal Procedure provides that, in determining whether a motion to suppress evidence should be granted, the state courts must consider, inter alia, (1) the importance of the particular interest violated; (2) the extent of deviation from lawful conduct; (3) the extent to which privacy was violated; and (4) the extent to which exclusion will tend to prevent violations of these rules.

The Arkansas Supreme Court held that "seizing the room" in this case 3 1/2 hours before a search warrant was obtained was "as much of an invasion of privacy as searching the room." This ruling is analogous to and consistent with this Court's ruling in Chambers v. Maroney, 399 U.S. 42 (1970), that the intrusion involved in initially seizing a car on the highway and holding it for the short time required to seek a warrant is so substantial as to be constitutionally indistinguishable from the intrusion involved in a subsequent search of the vehicle. "(T)he basic premise of Chambers' conclusion that seizures pending the seeking of a warrant are not constitutionally preferred to warrantless searches was that temporary seizures are themselves intrusive." Texas v. White, 423 U.S. 67, 71-72 (1975)(Mr. Justice Marshall, dissenting) (emphasis added).

If an emergency exists, no warrant is required before police officers may enter a person's home for the purpose of conducting a search or seizure. Arkansas Rules of Criminal Procedure, Rule 14.3. If, however, no such emergency exists, as it clearly did not in this case, police officers are not authorized to commit the kind of intrusion and invasion of privacy that occurred here without a prior showing of reasonable cause to a judicial officer and the issuance of a warrant. And even then, i.e., after the warrant has been issued, a nighttime intrusion such as occurred in this case is not allowed in this state unless the issuing judicial officer finds a special need for it. Arkansas Rules of Criminal Procedure, Rule 13.2. In this regard, although a Rule 13.2 issue was not raised in the trial court and thus was not discussed in the respondent's brief on appeal to the Arkansas Supreme Court, it is noteworthy that in the "Affidavit for Search Warrant" in this case one of the reasons given for the necessity of the immediate issuance and execution of a search warrant was that police officers had already "secure(d) the premises and persons involved" and were "presently awaiting a search warrant." (T. 19) The respondent submits that, if the issue were properly presented to it, the Arkansas Supreme Court would surely hold that our Rules of Criminal Procedure were not intended to sanction any attempt by police officers to receive judicial approval of a continuing intrusion by showing that the intrusion had already been initiated by them.

Police authorities in this state have been put on notice by the Arkansas Supreme Court that the highly intrusive "securing" (i.e., seizing) of a home in a non-emergency situation while application for a search warrant is being made will not be tolerated. The respondent respectfully submits that this ruling should be allowed to stand.

CONCLUSION

For the foregoing reasons, the respondent asks that the petition for a writ of certiorari be denied.

Respectfully submitted,

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